



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R05-OAR-2011-0502; FRL-9838-1]

**Approval and Promulgation of Air Quality Implementation Plans;
Wisconsin; Disapproval of PM_{2.5} Permitting Requirements**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to disapprove a revision to Wisconsin's State Implementation Plan (SIP) submitted by the Wisconsin Department of Natural Resources (WDNR) on May 12, 2011. The revision concerns permitting requirements relating to particulate matter of less than 2.5 micrometers (PM_{2.5}). EPA is taking final action to disapprove the revisions because they do not meet the 2008 PM_{2.5} SIP requirements. The proposed rulemaking was published December 18, 2012. During the comment period which ended on January 17, 2013, no comments were received.

DATES: This final rule is effective on [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R05-OAR-2011-0502. All documents in the docket are listed on the <http://www.regulations.gov> Website. Although listed in the index, some information is not publicly

available, *i.e.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m. Monday through Friday, excluding Federal holidays. We recommend that you telephone Andrea Morgan at (312) 353-6058 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Andrea Morgan, Environmental Engineer, Air Permits Section, Air Programs Branch (AR-18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353-6058, morgan.andrea@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we mean EPA. This supplementary information section is arranged as follows:

- I. Background
- II. Recent D.C. Circuit Decision

III. Revision to the Definition of Regulated Pollutant

IV. What Action Is EPA Taking on This Submittal?

V. Statutory and Executive Order Reviews

I. Background

This final rulemaking addresses the May 12, 2011, WDNR submittal, supplemented on March 5, 2012, revising the rules in the Wisconsin SIP to comply with the 2008 NSR Implementation Rule for PM_{2.5}. The original submission, and the supplement thereto, may be found in the docket for this action.

In May 2008, EPA finalized regulations to implement the New Source Review (NSR) Implementation Rule for PM_{2.5} to include the major source threshold, significant emissions rate and offset ratios for PM_{2.5}, interpollutant trading for offsets and applicability of NSR to PM_{2.5} precursors. On October 20, 2010, EPA amended the requirements for PM_{2.5} under the Prevention of Significant Deterioration (PSD) program by adding maximum allowable increase in ambient pollutant concentrations and screening tools known as the Significant Impact Levels (SILs) and the Significant Monitoring Concentration (SMC) for PM_{2.5}.

Wisconsin's submittals included provisions that were designed to match the requirements set forth in the May 2008 and October 2010 rules. Wisconsin submitted revisions to its rules NR 400, 404, 405, 406, 407, 408, and 484 of the Wisconsin

Administrative Code. The submittal included rules to define major source thresholds and significant emission increase levels; establish the SMC for PM_{2.5}; establish interpollutant trading ratios for PM_{2.5}, sulfur dioxide and nitrogen oxides; and clarify existing nonattainment area permitting rules. EPA announced through a memorandum, on July 21, 2011, a change in its policy concerning the development and adoption of interpollutant trading provisions for PM_{2.5}. The new policy requires that any ratio involving PM_{2.5} precursors submitted to EPA for approval for use in a state's interpollutant offset program for PM_{2.5} nonattainment areas must be accompanied by a technical demonstration that shows the net air quality benefits of such a ratio for the PM_{2.5} nonattainment area in which it will be applied. In a letter dated March 5, 2012, WDNR requested to withdraw its request to have NR 408.06(1)(cm), the provision pertaining to interpollutant trading ratios, included in its 2011 submittal.

EPA published a proposed disapproval of Wisconsin's submittal on December 18, 2012, because the submittal did not meet the 2008 PM_{2.5} SIP requirements. Specifically, the revisions submitted did not explicitly define the precursors of PM_{2.5}, nor did they contain the prescribed language to ensure that gases that condense to form particulate matter (PM), known as

condensables, are regulated within PM_{2.5} and PM of less than 10 micrometer (PM₁₀) emission limits. During the comment period EPA received no comments on the proposed action.

II. Recent D.C. Circuit Decision

On January 4, 2013, the U.S. Court of Appeals for the District of Columbia (D.C. Circuit or Court), in *Natural Resources Defense Council v. EPA*, 706 F.3d 428 (consolidated with 09-1102, 11-1430), remanded EPA's 2007 and 2008 rules implementing the 1997 PM_{2.5} National Ambient Air Quality Standards (NAAQS). The Court ordered EPA to "repromulgate these rules pursuant to Subpart 4 consistent with this opinion," as opposed to Subpart 1 of Part D, Title I, of the Clean Air Act (CAA). *Id.* at 437. Subpart 4 of Part D, Title I, of the CAA establishes additional provisions for PM nonattainment areas.

The 2008 implementation rule addressed by the Court decision, "Implementation of New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM_{2.5})," 73 FR 28321 (May 16, 2008), promulgated NSR requirements for implementation of PM_{2.5} in both nonattainment areas (nonattainment NSR) and attainment/unclassifiable areas (PSD). As the requirements of subpart 4 pertain only to nonattainment areas, EPA does not consider the portions of the 2008 rule that address requirements for PM_{2.5} attainment and unclassifiable areas

to be affected by the Court's opinion. Moreover, because EPA does not anticipate the need to revise any PSD requirements promulgated in the 2008 rule in order to comply with the Court's decision, EPA's disapproval of Wisconsin's submittal with respect to the PSD requirements promulgated by the 2008 implementation rule does not conflict with the decision.

Wisconsin's submission did include several provisions based on the nonattainment NSR requirements promulgated in the 2008 implementation rule. Since the proposed disapproval of Wisconsin's submittal predated the D.C. Circuit's decision, EPA did not include the nonattainment NSR provisions in the bases for disapproval. However, for any future nonattainment NSR submissions, WDNR should follow the Court's direction to implement the PM_{2.5} NAAQS consistent with subpart 4, which includes several provisions that affect the nonattainment NSR requirements in the 2008 rule. EPA expects to provide further guidance on this issue to assist the states with future submissions.

On January 22, 2013, the D.C. Circuit, in *Sierra Club v. EPA*, 705 F.3d 458, issued an order, *inter alia*, vacating the parts of two PSD regulations establishing a PM_{2.5} SMC (40 CFR 51.166(i)(5)(i)(c) and 40 CFR 52.21(i)(5)(i)(c)), finding that EPA was precluded from using the PM_{2.5} SMCs to exempt permit

applicants from the statutory requirement to compile preconstruction monitoring data.

Wisconsin included provisions for a PM_{2.5} SMC in its submittal. Because the proposed disapproval of December 18, 2012, predated D.C. Circuit's January 22, 2013, remand, EPA did not include the PM_{2.5} SMC as part of the basis for disapproval. However, as a result of the Court's decision, it is clear that EPA cannot approve any reference to the PM_{2.5} SMC in the State's PSD SIP.

III. Revision to the Definition of Regulated Pollutant

In an October 25, 2012, final rule EPA revised the definition of "regulated NSR pollutant" to correct an inadvertent error contained in the regulations for PSD at 40 CFR 51.166(b)(49)(vi) and 52.21 (77 FR 65107). The October 2012 final action removed an unintended new requirement on state and local agencies and the regulated community that PM emissions must generally include the condensable PM fraction. PM₁₀ and PM_{2.5} remain regulated as criteria pollutants and emissions of both of these PM indicators are still required to include the condensable fraction of PM emitted by a source in applicability determinations and in establishing enforceable emissions limitations. The October 2012 final rule became effective December 24, 2012.

In the proposed disapproval of Wisconsin's PM_{2.5} permitting requirements, which preceded the effective date of the revised condensables definition, EPA cited to the prior definition of "regulated NSR pollutant," which included the requirement to consider the condensable fraction for "PM emissions," as well as the condensable fraction for PM_{2.5} and PM₁₀ emissions. The revised definition reads, "PM_{2.5} emissions and PM₁₀ emissions shall include gaseous emissions from a source or activity which condense to form particulate matter at ambient temperatures." While this definition is less stringent than what was cited in the proposed disapproval of Wisconsin's revisions, because it no longer requires the inclusion of condensables for PM, it does not affect the bases for disapproval of the revisions, because the requirements to account for the condensable fraction of PM_{2.5} and PM₁₀ emissions in permitting decisions remain.

The October 2012 final rule also reorganized the placement of the definition of "regulated NSR pollutant." The provision of the 2008 PM_{2.5} NSR Implementation Rule that requires condensables be accounted for in PM_{2.5} and PM₁₀ permitting decisions is now codified in 40 CFR 51.166(b)(49)(i)(a) and 52.21(b)(50)(i)(a).

IV. What Action Is EPA Taking on This Submittal?

EPA is taking final action to disapprove the revisions to Wisconsin rules NR 400, 404, 405, 406, 407, 408 and 484, submitted by the State on May 12, 2011, for approval into the SIP. The rule revisions submitted are not consistent with Federal regulations governing state permitting programs. See the December 18, 2012, proposed rule.

Under section 179(a) of the CAA, final disapproval of a submission that addresses a requirement of a part D plan (section 171–193 of the CAA), or is required in response to a finding of substantial inadequacy as described in section 110(k)(5), starts a sanction clock. The submission that EPA is taking final action to disapprove was not submitted to meet either of these requirements. Therefore, with the final action to disapprove these submissions, no sanctions under section 179 will be triggered.

The full or partial disapproval of a SIP revision triggers the requirement under section 110(c) of the CAA that EPA promulgate a Federal Implementation Plan (FIP) no later than two years from the date of the disapproval unless the state corrects the deficiency, and the Administrator approves the plan or plan revision before the Administrator promulgates such FIP. However, since elements of this SIP revision were narrowly disapproved under the Infrastructure SIP, the two year timeframe

began with the final narrow disapproval of Wisconsin's Infrastructure SIP (October 29, 2012; 77 FR 65478). EPA will actively work with Wisconsin to incorporate changes to its PSD program that explicitly identify PM_{2.5} precursors and account for the condensable fraction of PM_{2.5} and PM₁₀ emissions in establishing enforceable permit emissions limits, consistent with the 2008 NSR Rule. In the interim, EPA expects WDNR to adhere to the associated requirements of the 2008 NSR Rule in its PSD program, specifically with respect to the explicit identification of PM_{2.5} precursors, and accounting for the condensable fraction of PM_{2.5} and PM₁₀ emissions in applicability determinations and enforceable permit emissions limits.

V. Statutory and Executive Order Reviews.

Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and, therefore, is not subject to review by the Office of Management and Budget.

Paperwork Reduction Act

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Regulatory Flexibility Act

This action merely disapproves state law as not meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Unfunded Mandates Reform Act

Because this rule disapproves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain an unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4).

Executive Order 13132: Federalism

This action also does not have Federalism implications because it does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely disapproves a state rule, and does not alter the relationship or

the distribution of power and responsibilities established in the CAA.

Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (59 FR 22951, November 9, 2000).

Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it disapproves a state rule.

Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

Because it is not a "significant regulatory action" under Executive Order 12866 or a "significant energy action," this action is also not subject to Executive Order 13211, "Actions

Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001).

National Technology Transfer Advancement Act

In reviewing state submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. In this context, in the absence of a prior existing requirement for the state to use voluntary consensus standards (VCS), EPA has no authority to disapprove a state submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a state submission, to use VCS in place of a state submission that otherwise satisfies the provisions of the CAA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and

activities on minority populations and low-income populations in the United States.

EPA lacks the discretionary authority to address environmental justice in this action. In reviewing SIP submissions, EPA's role is to approve or disapprove state choices, based on the criteria of the CAA. Accordingly, this action merely disapproves certain state requirements for inclusion into the SIP under section 110 and subchapter I, part D of the CAA and will not in-and-of itself create any new requirements. Accordingly, it does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898.

Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of

Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. section 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [INSERT DATE 60 DAYS FROM THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control,
Incorporation by reference, Intergovernmental relations,
Nitrogen dioxide, Particulate matter, Reporting and
recordkeeping requirements, Sulfur oxides.

Dated: July 10, 2013

Susan Hedman,
Regional Administrator, Region 5.

40 CFR part 52 is amended as follows:

PART 52--APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart P - Indiana

2. Section 52.2592 is added to read as follows:

§ 52.2592 Review of new sources and modifications

Disapproval – On May 12, 2011, the Wisconsin Department of Natural Resources submitted a proposed revision to its State Implementation Plan to update its rules to match the 2008 New Source Review Implementation Rule for PM_{2.5}. The State supplemented the submittal on March 5, 2012. EPA determined that this submittal was not approvable because the revisions did not explicitly identify the precursors to PM_{2.5} and did not contain the prescribed language to ensure that gases that condense to form PM, known as condensables, are regulated within PM_{2.5} and PM₁₀ emission limits.